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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 750

SALVATORE GRANELLO and HYMAN LEVINE,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Salvatore Granello and Hyman Levine, respectfully pray that a Writ of Certiorari issue to review the respective judgments of the United States Court of Appeals for the Second Circuit, affirming petitioners' convictions and sentences for violating 26 U.S.C. § 7203 (wilfully failing to file income tax returns for 1956 and 1957).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is reprinted in the appendix (App. 1-15).*

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* Unless the context clearly indicates otherwise, references in parentheses are distinguished as follows: To the Appendix of this petition by App.; to the stenographic minutes of the trial, by S.M.; to the Government's appendix in the Court of Appeals by G.App.

Jurisdiction

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court on August 3, 1966. On October 6, 1966 it denied a rehearing, but granted a stay of mandate as to Salvatore Granello. The mandate as to Hyman Levine issued on the 20th of October 1966. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

Questions Presented

1—Whether petitioners have "standing" as aggrieved parties under Rule 41(e) F.R. Crim. P. to challenge the use against them of non-contraband evidence which was adjudicated to have been unlawfully seized from and ordered returned to their attorney and co-conspirator (Birrell), and upon which their convictions were exclusively predicated.

2—Whether, in view of the narrow interpretation of "standing" by the Court below and some, but not all, of the other Circuits, the Government is free to conduct indiscriminate "exploratory searches" in utter disregard of the Fourth Amendment for the deliberate and calculated purpose of using such illegally obtained evidence and the fruits thereof against persons other than the immediate victim of their lawless conduct? Should the *"third party"* enigma be clarified?

This raises the following subsidiary questions:

(a) If the government has the right to use illegally acquired evidence or the fruits thereof, may they also accept such tainted evidence from other jurisdictions on a so-called "silver platter" (*Elkins v. United States*, 364 U.S. 206 (1960)?

(b) May law enforcement officials who participate in an unlawful search nevertheless testify in any case where such tainted evidence is to be used so long as the defendant was not the immediate victim of the illegality? (*Rea* v. *United States*, 350 U.S. 214 (1956)?

(c) Does the rule of *People* v. *Defore*, 242 N.Y. 13 still apply as to *third* parties?

3—Whether the pronouncements of this Court in many cases that official lawlessness can be deterred only by barring the use of illegally obtained evidence altogether, really mean that the Government may not benefit from its own misconduct, or that it may nevertheless use illegally acquired evidence against all the world, except the immediate victim of the illegality?

4—Whether illegally seized *non-contraband* evidence and the fruits thereof which have been suppressed and ordered returned to the victim may be subpoenaed by the government for use against parties other than the immediate victim?

This raises the subsidiary questions:

(a) Does *McDonald* v. *United States*, 335 U.S. 451 mean that such illegal evidence cannot be subpoenaed if, *but for* the illegal search, the Government would have been unaware of its existence?

(b) Do *Jones* v. *United States*, 362 U.S. 257 and *McDonald* v. *United States*, enlarge the concept of "standing" as defined in Rule 41(e) F.R. Crim. P. to permit anyone against whom the Government seeks to introduce illegally acquired evidence to object thereto?

(c) Whether the District Court must at least hold an evidentiary hearing in such cases. The Petitioners herein were denied an evidentiary hearing.

5—Whether, in view of the fact that petitioners were acquitted of conspiracy in the first trial, Granello's motion under Rule 8-b, F.R. Crim P., for a severance should have been granted as a matter of law and whether it was fundamental error to deny it as an exercise of discretion?

6—Whether, in view of their acquittal of conspiracy after the first trial, it was a violation of the principles of double jeopardy, res judicata, and collateral estoppel to permit the Government to prove the existence of a "partnership in crime" or joint venture to convict petitioners in the second trial? (*Sealfon* v. *United States*, 332 U.S. 575 (1948)?

7—Whether petitioners' right to confront witnesses and to compulsory process to secure attendance of witnesses guaranteed by the Sixth Amendment was violated when the trial court, in effect, prevented petitioners from calling the crucial witness, Birrell, because he had indicated that he would probably invoke the privilege against self-incrimination?

8—Whether petitioners rights to a fair trial were violated by the trial court's warning that defense counsel were not to mention the fact that petitioners had been acquitted of conspiracy?

9—Whether petitioners were deprived of a fair trial and due process of law by the government's inadvertent or perhaps deliberate omission to supply the jury with an important exhibit which exhibit was found on the prosecutor's desk after the verdict?

Constitutional and Statutory Provisions Involved

Pertinent portions of the Fourth, Fifth and Sixth Amendments of the Constitution of the United States and the statutes involved, namely Rules 8, 14, 33 and 41, F.R. Crim. P.; Title 18 U.S.C. §371 and Title 26 U.S.C. (1954 IRC) §§351, 368, 453, 1001, 1002, 1201, 1202, 1222, 7201 and 7203 are reprinted in the Appendix (App. 25-33).

Statement of the Case

1—Proceedings Below:

The adjudication of the Court of Appeals, Second Circuit, sought to be reviewed by this Petition affirmed a judgment of the United States District Court for the Southern District of New York convicting each petitioner for violating 26 U.S.C. §7203 (wilfully failing to file income tax returns for 1956 and 1957), after trial before Dimock, J. and a jury. Each petitioner was sentenced to imprisonment for one year on each count to be served consecutively and to a fine of $1000 on each count. Jurisdiction is conferred on the District Court by 18 U.S.C. §3231.

(Petitioners were tried twice. The first trial ended in a "hung jury". The jury failed to agree on all counts, except the misdemeanors stated, in the second trial.)

2—Summary Statement of the Facts:

A—*All incriminating evidence against petitioners was secured by an unlawful search and seizure of records in the custody of one Lowell Birrell, petitioners' attorney and named as a co-conspirator.*

As found by the Court below, virtually all of the incriminating evidence used against petitioners had been obtained

by the government as a result of an unlawful search and seizure of *non-contraband* evidence from the custody of one Lowell Birrell who had represented the petitioners as attorney and who was named as a co-conspirator in the information filed against them (63 Cr. 342, count Five). This unlawful search and seizure occurred in July and August of 1959, well before any charges were filed against Granello and Levine. (See opinion of Court below, slip opinion 2993, App. 11).

The Government does not dispute that *but for* the evidence which had been unlawfully obtained from the Birrell seizure, the government would not have been able to prosecute petitioners on the charges herein.

That the records seized from Birrell were *unlawfully obtained* has been established as has the fact that they were *ordered to be returned* to him (*United States* v. *Birrell*, 242 F. Supp. 191 (S.D.N.Y. 1965).

The petitioners made motions, admittedly timely, before the first and second trials for the suppression of this evidence against them. The decision in the *Birrell* case did not become known until the second trial had commenced. Judgment had not yet been pronounced in the second trial when *United States* v. *Birrell, supra,* was decided. The trial judge at the second trial not only refused to hold an evidentiary hearing, but held as a matter of law that the petitioners lacked "standing" to challenge the admission of this evidence (*United States* v. *Granello*, 243 F. Supp. 325, S.D.N.Y. —1965, reprinted in appendix, App. 16-24).

Before the *Birrell* case was decided, and as far back as February 25, 1963, the government had strong cause to believe that the evidence seized from Birrell had been ob-

tained in violation of the Fourth Amendment.* Yet, the government never called this to the attention of the Court or of the defense (*Brady* v. *Maryland*, 373 U.S. 83; *Berger* v. *United States*, 295 U.S. 78). The government obviously proceeded on the premise that evidence obtained in violation of A's (Birrell's) constitutional rights could nevertheless be used against B and C (Granello and Levine). It is not known whether or not the search of Birrell's files was of an "exploratory nature" to find incriminating evidence against Granello and Levine as no evidentiary hearing was afforded by the trial judge.

B—*The conspiracy counts did not survive the first trial as they were dismissed by action of the government as to the information, and by an order of acquittal by the Court as to the indictment.*

Prior to the summations in the first trial, both conspiracy charges had already been removed from the case "on the merits". The government itself moved to dismiss the conspiracy charge in the information after jeopardy attached, and the court granted a motion to "acquit" petitioners on the conspiracy count in the indictment.

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* The writer of this petition has been advised in an affidavit signed by Irwin L. Germaise, Esq., counsel to Levine in the trial Court below that he personally saw a letter dated February 25, 1963 signed by William V. Crosswhite, Regional Counsel of the Internal Revenue Service, New York, N. Y. addressed to Hon. Louis F. Oberdorfer, Assistant Attorney General, Tax Division, Department of Justice, Washington 25, D. C. which letter was introduced as Government's Exhibit #122A for identification in the first trial of the petitioners, stating that the search and seizure of the records and documents of Lowell Birrell had been found to be illegal by the Criminal and Tax Divisions of the Department of Justice.

C—As a result of the removal "on the merits" of all conspiracy charges in the case after the first trial on which the jury "hung", Granello made a timely motion prior to the second trial, under rule 8(b), F. R. Crim. P. for a severance. This was denied apparently on the theory that the trial court could exercise discretion.

Following the acquittal on the conspiracy charges in the first trial which resulted in a "hung jury", the petitioner Granello moved to sever under Rule 8(b), F. R. Crim. P. The trial court denied this motion in the exercise of discretion. The Court of Appeals recognized the difficulty with this idea of confusing such a motion with one under Rule 14, F. R. Crim. P and had great difficulty in circumventing this (see slip opinion 2988, 2989, App. 7-10).

D—Despite the fact that there were no allegations of conspiracy, the government, at the second trial, over objection, was permitted to prove, in essence, a partnership in crime or conspiracy. The same proof, in substance, was introduced in the second trial as had been proffered by the prosecution in the first trial.

The whole basis of the case against petitioners hinged on the government's ability to prove that they controlled 80% of the Pacheco Petroleum Co. stock. As to Granello, it was obvious that he never owned that quantity of stock. But the government conceded that separately it was not alleging that Granello and Levine owned 80% of Pacheco stock. Rather it was the prosecutor's contention that petitioners owned or controlled 80% of the Pacheco stock *jointly* (G-App 18-a). While it was obvious that this necessarily involved a "conspiracy", the trial court, in the second trial, nevertheless permitted the adduction of evidence along these lines.

The government alleged that the petitioners had earned substantial reportable income in 1956 and 1957 as a result of the transactions involving Pacheco. The petitioners not only denied this but insist that only by proof of a conspiracy was it even remotely possible that the jury could have so concluded (S.M. 2922-2955; 2989). No conspiracy is charged.

The Information and Indictment

The charges in this case are contained in an information (63 Cr. 342), filed on April 11, 1963, and an indictment (64 Cr. 271), filed on March 9, 1964.

The information alleged, in the First Count, that appellant Salvatore Granello failed to file a federal income tax return for the year 1956, for which year he is alleged to have received gross income in the approximate amount of $118,500.00. The Second Count alleged that Mr. Granello similarly failed to file an income tax return for the year 1957, during which year he is alleged to have received gross income in the approximate amount of $97,000.00. The Third Count alleged that appellant Hyman Levine failed to file a federal income tax return for the year 1956, for which year he is alleged to have received gross income in the approximate amount of $132,750.00. The Fourth Count alleged that Mr. Levine similarly failed to file an income tax return for the year 1957, during which year he is alleged to have received gross income in the approximate amount of $97,000.00.

Count Five of the information alleged a conspiracy among appellants Granello and Levine, together with Lowell M. Birrell, named as a co-conspirator but not as

a defendant, to violate §7202 of Title 26, United States Code. It was alleged that it was a part of said conspiracy that appellants, being persons required under the Internal Revenue Code to make income tax returns, would unlawfully, wilfully and knowingly fail to make such returns. It was also further alleged that, as a part of said conspiracy, appellants, being persons required under Title 26, United States Code and by regulations made under said code, to supply information to the Internal Revenue Service, would unlawfully, wilfully and knowingly fail to supply such information.

The indictment in this case alleged, in Count One, that appellant Granello, who received gross income during the calendar year 1957, in the approximate amount of $97,000.00, upon which he owed approximately $17,055.00, in income taxes, failed to file an income tax return and to pay the taxes for said year, with alleged concealment and attempts to conceal from all proper officers of the revenue service, his true and correct taxable income. Count Two alleged that appellant Levine, who received gross income during the calendar year 1957, in the approximate amount of $97,000.00, upon which he owed approximately $18,117.00, in income taxes, failed to file an income tax return and to pay the income taxes for said year, with alleged concealment and attempts to conceal from all proper officers of the revenue service, his true and correct taxable income.

Count Three alleged a conspiracy between appellants Granello and Levine from January 1, 1955 to the date of filing the indictment, to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Treasury Department in the collection of

income taxes herein. Said Count contained further allegations:

> "2. It was further a part of said conspiracy that the defendants would conceal and continue to conceal the source, nature and destination of any and all of their income during the years covered by this conspiracy.
>
> 3. It was a part of said conspiracy that the defendants would conceal and contrive to conceal the nature of their business activities.
>
> 4. It was further a part of said conspiracy that the defendants would attempt to evade and defeat the income tax due and owing by them to the United States of America, by failing to file income individual tax returns as required by law and by other means." *

POINT I

This case squarely raises the issue of "standing" under Rule 41(e) F.R. Crim. P. unresolved in *McDonald v. United States*, 335 U.S. 51, and *Jones v. United States*, 362 U.S. 257, namely: may the government, despite a timely motion to suppress, use evidence which was *held* to have been illegally seized from "A" (Birrell) against "B" and "C" (Granello and Levine), Birrell's legal clients and co-conspirators.

This Court should rule in the negative so as to close a serious loophole in the Fourth Amendment.

At the trial of Granello and Levine the government predicated its entire case against these defendants upon evidence which had been obtained in 1959 by an unlawful search and

* As already noted, petitioners were acquitted of conspiracy at their first trial.

seizure of the records owned or in the control of their erstwhile attorney, Lowell Birrell. *Birrell was also named as a co-conspirator in the original charges.* A coordinate Judge of the United States District Court for the Southern District of New York, (Wyatt, J.) determined that the seizure of Birrell's records had been unconstitutional and ordered their return to him. (*United States* v. *Birrell,* 242 F. Supp. 191 [S.D.N.Y. 1965]).

A timely motion had been made by petitioners to suppress the evidence which had been unlawfully obtained from Birrell, and to bar its use in the case against Granello and Levine. The trial judge heard oral argument on the motion to suppress but did not conduct an evidentiary hearing and did not make findings of fact and conclusions of law. Instead he determined that as a matter of law, since Granello and Levine were not the immediate victims of the unlawful search and seizure, they lacked "standing" as aggrieved parties under Rule 41 (e) of the Federal Rules of Criminal Procedure to even raise the question of illegality. (See *United States* v. *Granello,* 243 F. Supp. 325, [S.D.N.Y. 1965] App. 22-24).

In the last cited case, *United States* v. *Granello, supra,* Judge Dimock acknowledged that a novel question of law was presented, stating (App. 23, 24):

> "Deterrence of official illegality has been the primary reason for the raising to constitutional dignity of the exclusionary rule as it has been applied up to now (citing cases) . . . Perhaps . . . a broadening is desirable, but *that is a matter ultimately for the Supreme Court . . .*" (Emphasis ours)

See also, *Rea* v. *United States*, 350 U.S. 214 (1950).

Accord:

People v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955).

What occurred in the case at bar, therefore, in a nutshell is the following:

Certain records had been given to Lowell Birrell, an attorney at law, by petitioners Granello and Levine some time prior to the institution of the criminal charges herein. Birrell had represented both Granello and Levine as an attorney.

The government seized a large number of Birrell's records in a manner which was *held* to be an unconstitutional search and seizure in violation of the Fourth Amendment (*United States* v. *Birrell, supra*). Birrell successfully sought to suppress the use of these records as against himself and obtained an order that they be returned to him.

The government, nevertheless, used the records which it had obtained from Birrell in the aforesaid unconstitutional manner and predicated its entire case against petitioners upon the contents thereof. The petitioners made a timely motion to suppress this evidence, but the District Judge (Dimock, J.) ruled that they lacked "standing" under Rule 41(e) of the Federal Rules of Criminal Procedure to raise this issue.

The Court of Appeals for the Second Circuit affirmed the determination of the District Court holding that *Jones* v. *United States*, 362 U.S. 257 (1960) merely meant that unlawfully seized property and its fruits, should be "sterilized

as against the victims of the unlawful action." (*United States* v. *Granello*, — F. 2d—, decided 8/3/66 slip opinion 2983, 2994, App. 13.)

Moreover, the Second Circuit, in the same opinion, interpreted *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385 (1920), as meaning that irrespective of whether unlawfully seized property has been returned to the owner, the government might nevertheless use the contents thereof or its knowledge obtained therefrom against anyone else in the world except the immediate victim of the illegal action, either via photocopies it had made (Best Evidence Rule) or by subpoenaing the originals.*

What this really amounts to is that the Court of Appeals and the District Court in this case have ruled that the government is free to conduct indiscriminate searches and seizures, with or without search warrants, with the assurance that the only persons against whom such evidence and the poisoned fruits thereof can not be used, will be the immediate victims of the lawless action. It has been held by other Circuit Courts that a contrary rule should prevail:

Compare:

Rosencranz v. *United States* (1st Cir. 1964), 334 F. 2d 738 (rehearing);

Hair v. *United States* (D.C. Cir. 1961), 289 F. 2d 894;

Schoeneman v. *United States* (D.C. Cir. 1963), 317 F. 2d 173;

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* The District Court likewise contended that the government could always subpoena evidence for use against *Third* Parties, even though its knowledge of the existence thereof was because of a lawless search and seizure (App. 21, 22).

Diaz-Rosendo v. *United States* (9th Cir. 1966) (reversing itself on rehearing), 357 F. 2d 124;
Plazola v. *United States* (9th Cir. 1961), 291 F. 2d 56;
United States v. *Mullen*, 329 F. 2d 295 (5th Cir. 1964);
United States v. *Bozza*, (2 Cir. 1966) — F. 2d — (Slip Opin. 2889ff).

Where the property seized is *not contraband* as in the case at bar, it appears that a distinction may be made. (Cf. *Anderson* v. *United States*, 318 U.S. 350, 356 (1943); *McDonald* v. *United States, supra; Gouled* v. *United States*, 255 U.S. 289, 312-313; *Amos* v. *United States*, 255 U.S. 313, 316-317; 62 Harv. L. Rev. 1229, 1230-31 (1949); 8 Wigmore Evid. §2184 (3 ed. 1940).

The Supreme Court of California banned illegally seized evidence as against third parties after reconsidering the rule.

See:

People v. *Martin*, 45 Cal. 2d 755; 290 P. 2d 855 (1955).

It would appear that the holdings in cases such as the one at bar have succeeded in turning back the clock and resurrecting the rule condemned by *Weeks* v. *United States*, 232 U.S. 383 (1914) and *Mapp* v. *Ohio*, 367 U.S. 643 (1961). It would seem that so far as the Government is now concerned, the rule of *People* v. *Defore*, 242 N.Y. 13, that evidence, otherwise admissible cannot be excluded solely because it was obtained by an unlawful search and seizure is

the third party rule now. It is incredible that an anachronism of this sort should be permitted to effectively thwart and circumvent the Fourth Amendment, *Weeks*, and *Mapp* to a significant degree.

The policy of condemning lawless conduct by the government as a deterrent is now only applied to immediate victims and not to third persons or even to co-conspirators and law clients of a victim.

(See: *Mapp* v. *Ohio, supra; Wong Sun* v. *United States,* 371 U.S. 471; *Elkins* v. *United States,* 364 U.S. 206; *One Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693. See, too, *Rea* v. *United States,* 350 U.S. 214 (1956).)

The instant case and cases like it therefore has rendered almost nugatory all the important advances which have been wrought by this tribunal and state courts recently in the field of search and seizure. The entire policy expressed by this Court condemning the lawless action of Federal authorities by mandating that the government could not gain from such lawless action, is now but a hollow echo with little true significance. (*Walder* v. *United States,* 347 U.S. 62, 64-65.)

In *McDonald* v. *United States,* 335 U.S. 451 (1948), this Court held that it would not condone the use of evidence obtained by government officials who had broken into a rooming house and had then peered through a transom of one of the rooms to obtain incriminating evidence. In that case, the defendant, McDonald, was present in his rented room with one Washington. This Court held that the evidence was unlawfully obtained as against not only McDonald, but Washington, as well, despite the fact that

Washington was not a resident of that particular house or room.*

In *McDonald*, this Court explained that it specifically was *not deciding* an important issue of *"standing"* which is again raised in the instant case and should be decided once and for all. Thus in *McDonald*, 335 U.S. at 456, this Court explained:

> "Even though we assume, *without deciding*, that Washington who was a guest of McDonald had no right of privacy that was broken when the officers searched McDonald's room without a warrant, we think that the denial of McDonald's motion was error that was prejudicial to Washington as well . . . [I]n this case . . . the unlawfully seized materials were the basis of evidence used against the co-defendant. If the property had been returned to McDonald it would *not* have been available at the trial." (Emphasis supplied)

In *Jones* v. *United States*, 362 U.S. 257 (1960), the issue of *"standing"* was enlarged beyond the limits of what it had been theretofore by indicating that rule 41(e), F. R. Crim. P. permitted a person accused of a narcotics violation to challenge the lawfullness of a search and seizure without admitting ownership or possession of the items involved. *Jones* clearly demonstrates that this Court is not so much concerned with actual ownership but rather with whether the government has acted in a lawless manner in obtaining the evidence, and whether justice will be subverted by permitting the government to profit from its own wrongdoing.

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* See concurrence of Mr. Justice Rutledge in *McDonald* favor an absolute ban.

In this context, this Court decided *Mesarosh* v. *United States*, 352 U.S. 1. In *Mesarosh*, this Court explained (*id.* at 9, 14):

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial . . . This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the Federal Courts. If it has a duty to perform, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity . . . ['T]he untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts . . . The government of a strong and free nation does not need convictions based upon such testimony'."

In *Silverthorne Lumber Co.* v. *United States, supra* and *Wong Sun* v. *United States, supra*, this Court made it very plain that unlawfully seized evidence or evidence obtained in an unconstitutional manner *must "not be used at all."* In addition, this Court asserted that "knowledge gained by the government's own wrong cannot be used by it . . ." (*Silverthorne Lumber Co.* v. *United States*, 251 U.S. at 392; *Wong Sun* v. *United States*, 371 U.S. at 485).

In *Elkins* v. *United States, supra, Rea* v. *United States, supra, Wilson* v. *Schnettler*, 365 U.S. 381 (1961), *One Plymouth Sedan* v. *Penna., supra*, and other cases, this Court condemned the use of illegally obtained evidence by the government in any manner be it by virtue of a so called

"silver platter" doctrine or by virtue of the participation of a federal agent in wrongdoing by state officers.

Yet in the case at bar, the government received evidence against Granello and Levine on a so called "silver platter" because it concededly could not possibly have proceeded against Granello and Levine *but for* the unconstitutional seizure of the Birrell records. In addition, it is significant that federal officers who participated in this lawless conduct were permitted to aid the government in the presentation of its case against these petitioners. The government was apparently aware of the unlawful search and seizure of the Birrell records but never informed the Court or defense (*Brady* v. *Maryland*, 373 U.S. 83).*

The vital aspects of this case disclose that the entire protection of the Fourth Amendment will be undermined and rendered almost nugatory unless something by this Court is done to impress the government with the fact that it may not benefit by its own lawless conduct and that indiscriminate searches and seizures may not be conducted nor may evidence based thereon be used for any purpose whatsoever, be it against the immediate victim or otherwise. Any contrary rule means that the government may take a calculated risk and seize evidence at will without search warrants with the assurance that it will only be precluded from prosecuting the immediate victim, but will always be able to prosecute everybody else against whom they may find incriminating evidence.

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* As explained *supra*, footnote, p. 7, the government had a letter from the regional counsel of the I.R.S. addressed to the Assistant Attorney-general, Dept. of Justice, Tax Division as early as February 1963 advising the prosecution that the search and seizure of the Birrell records were violative of the Fourth Amendment.

Incidentally, the Court below (App. 12) argued that suppressing evidence illegally seized, as to the victim as well as third persons, would perhaps result in permitting third persons *plotting* a major crime to go free. It failed to recognize that the Government could use the information to protect the official and could arrest anyone who was actually *seen* attempting to or committing a crime. Thus, the spectre conjured up by the Court below is unreal and illusory.

POINT II

This Court has clearly recognized that the purpose of the exclusionary rule of the Fourth Amendment is not to provide redress or punishment for past wrong, but to *deter* lawless enforcement of the law. Thus, to leave undisturbed the ruling of the Court below that only immediate victims of unlawful searches and seizures have "standing" as "aggrieved" parties strongly tends to encourage the lawless enforcement of the law.

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The trend of extending the exclusionary rule to any lawless conduct of the government as indicated by *Jones* v. *United States* and *McDonald* v. *United States* should be carried to its logical conclusion that never may the government benefit by its own wrong-doing. To the extent, if at all, *Goldstein* v. *United States* is inconsistent, it should be overruled.

In *People* v. *Defore*, 242 N.Y. 13, Judge Cardozo, then of the New York Court of Appeals, expressed the view of that court that even illegally seized evidence might be admissible since he saw no reason to exclude evidence merely because the constable "blundered."

This Court in *Weeks* v. *United States*, *supra* and *Mapp* v. *Ohio*, has expressly rejected such a view.

When it was apparent that the exclusionary rule could be circumvented by getting the evidence on a "silver platter" from another jurisdiction, this Court *closed that gap. Elkins* v. *United States, supra.*

When it appeared that federal officers might help other jurisdictions and thus indirectly benefit from their own wrong doing, this Court then again *closed this loophole,* too. (*Rea* v. *United States*).

It is now apparent that a *serious flaw still remains* to be corrected in the protection required under the Fourth Amendment. This is the "Pickwickian" interpretation given to "standing" as "aggrieved" parties. As now interpreted by some, but not all of the circuits, as already noted *supra,* the government is free to make any searches they desire in utter disregard of the Fourth Amendment if they so choose, not for the purpose of using such evidence against the immediate victim of the illegality, but rather to employ against third parties who were not the so called "immediate victims" of the lawless conduct.

Thus the government may now make "exploratory searches" of anyone it selects in the hope that perhaps evidence of some sort of illegality will be uncovered against third persons. *This strongly encourages lawless conduct since the government is tempted to "play the odds."* In other words, the prosecutor can determine to invade the home or office of "A", knowing that he will not be able to use the evidence thus seized against "A". Yet, if he believes that such evidence can be used to find something incriminating against "B", "C", "D", etc., it is certainly worth his while since the Court below has assured him that he will only lose "A", and to the lawless government agent, "A" may be expendable.

Therefore, if government agents are permitted to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, the deterrent effect of the Fourth Amendment is to that extent nullified.

In *People* v. *Martin, supra,* the California Supreme Court specifically rejected the use of evidence illegally obtained against anyone, including third persons. Thus at 857 of 290 P. 2d, the California court recognized:

> "Thus, the rule of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy. Connolly v. Medalic, supra, 58 F. 2d 629, 630. In adopting the exclusionary rule, however, this court recognized that it could not be justified on that theory, People v. Cahan, 44 Cal. 2d 434, 443, 282 P. 2d 905, and based its decision on the ground that '*other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.*' 44 Cal. 2d at page 445, 282 P. 2d at page 911. This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, *its deterrent effect is to that extent nullified.* Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others

by the use of the evidence illegally obtained against them." (Emphasis ours)

This Court has clearly recognized that the whole purpose of the exclusionary rule is not to provide redress for past wrongs, but rather to *deter* lawless conduct by government officials. In *Walder* v. *United States,* 347 U.S. 62 at 64-65, this Court succinctly explained:

> "The Government cannot violate the Fourth Amendment * * * and use the fruits of such unlawful conduct to secure a conviction. [Citation.] *Nor can the Government make indirect use of such evidence for its case* [citation], or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. [Citation.] All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." (Emphasis supplied)

What this Court lately said in *Jones* v. *United States* and *McDonald* v. *United States, supra,* is largely consistent with the holding of the California court. Indeed, the California Supreme Court based its own decision in *People* v. *Martin, supra,* largely on opinions of this Tribunal, citing especially *McDonald, Jones,* and *Walder* as well as other decisions of this Court.

The case at bar is an even more shocking violation of the Fourth Amendment because of the fact that the trial court was unmoved by the fact that an attorney-client relationship had existed between Birrell and petitioners making it more probable that Granello and Levine were not even "third" parties to the illegal search, but in fact were in

"constructive possession" of some or all of the incriminating evidence used against them. All this was exacerbated the more by the utter refusal of the trial court at the second trial to conduct an evidentiary hearing or make conclusions of law or findings of fact.

The trial judge (Dimock, J.) was himself quite well aware of the fact that a serious issue was presented which is as yet "unsettled" and thought that the Supreme Court should resolve it. (See *supra*, p. 12.)

Silverthorne Lumber Co., supra, Wong Sun, supra, as well as other cases have consistently held that unlawfully obtained evidence shall not only not be used against the victim in a case, but that *it shall not be used at all.* This is meaningful only if properly enforced. If it may be used against everyone in the world except the so-called immediate victim, then there is little protection in the Fourth Amendment. To the extent, if any, this Court's decision in *Goldstein* v. *United States,* 316 U.S. 114 may be deemed inconsistent, it should certainly be over-ruled. After all, *Goldstein* pre-dated *Mapp, Wong Sun, Walder, McDonald,* and *Jones.*

A recent comment in the Columbia Law Review, 66 Col. L. Rev. 400, 405 (1966) dealing with the case at bar quite aptly noted:

> "Recent developments in the treatment of the exclusionary rule, especially its elevation to the constitutional plane in *Mapp* v. *Ohio* and the increasing willingness to rest it upon the fourth amendment alone, *suggest a need to reevaluate the position of the third party.* In 1955, after reconsidering the rule, the California Supreme Court banned the introduction of

> illegally obtained evidence in trials of third parties. By avoiding the standing question, Judge Dimock was at least able to pinpoint the factors relevant to the reevaluation of the rule. *Hopefully,* the appellate courts and, ultimately, *the Supreme Court will also reach these considerations in reexamining and clarifying the scope of the fourth amendment's exclusionary rule."* (Emphasis ours)

See, *Bloustein, Privacy As An Aspect Of Human Dignity,* 39 N.Y.U.L. Rev. 962, 973-4 (1964).

This Court alone can purify the "polluted waters" of injustice by clarifying the thrust of the Fourth Amendment in reference to "standing" once and for all. It is incumbent upon this Court, not only in its role as the highest tribunal in the land, but in its supervisory capacity over the federal courts. This is especially so when the Circuit courts themselves are in disagreement on what is to be done.

POINT III

There is a sharp conflict of opinion as well as substantial confusion among the Circuit Courts as to what this Court said and meant in *Jones* v. *United States* and *McDonald* v. *United States*. In other words, the question of "standing" as an aggrieved party under Rule 41(e) to object to an unlawful search and seizure remains an enigma.

A perusal of the opinions of several of the Courts of Appeal in various Circuits indicate that there is a substantial disagreement as well as confusion as to what this Court meant in *Jones* v. *United States, supra,* and *McDonald* v. *United States, supra.* It would appear, for

example, that the First Circuit and the Court of Appeals for the District of Columbia interpreted *McDonald* and *Jones* as holding that any use of evidence by the government which has been unalwfully obtained in violation of the immediate victim's constitutional rights may be barred from evidence upon a timely motion made by co-conspirators, co-defendants or the like. See, *Schoeneman* v. *United States* (App. D.C. 1963), 317 F. 2d 173; *Hair* v. *United States* (App. D.C. 1961), 289 F. 2d 894; *Rosencranz* v. *United States*, 334 F. 2d 738 (1st Cir. 1964); *Woods* v. *United States* (App. D.C.), 240 F. 2d 37 (1956) cert. denied 353 U.S. 941 (1957); *Nelson* v. *United States* (App. D.C. 1952), 208 F. 2d 505, 514, cert. denied 346 U.S. 827; *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2 Cir. 1946); *Diaz-Rosendo* v. *United States* (9 Cir. 1966), 357 F. 2d 124; and *Plazola* v. *United States* (9 Cir. 1961), 291 F. 2d 256.

In the *Diaz-Rosendo* case, *supra*, it appears that the Ninth Circuit was considerably troubled over the thrust of this Court's opinion in *Jones* v. *United States* since it was constrained to overrule a three man bench by an en banc hearing. The Ninth Circuit apparently is of the opinion that the *Jones* case means that Rule 41(e) has been expanded but apparently limits such expansion to the situation where a co-defendant is actually present when an unlawful search and seizure is conducted as against the defendant.

Yet, in *Plazola* v. *United States, supra*, only distinguished in *Diaz-Rosendo*, the Ninth Circuit found that "constructive" possession of marijuana in a car other than that in which Plazola was driving was sufficient to warrant the exclusion of the evidence as against Plazola because of its

interpretation of *Jones* v. *United States.* It is of course possible that *Plazola* could be otherwise interpreted but this is the inescapable explanation which is inferred from *Diaz-Rosendo* v. *United States,* 357 F. 2d at 133.

In the instant case, the United States Court of Appeals for the Second Circuit did not discuss or consider the theory of *"constructive possession"* but contented itself with a decision which rested on the assumption that Granello and Levine had no rights to object to the introduction of the Birrell records against them merely because they were not the immediate victims of the unlawful search and seizure.

The Second Circuit however, apparently overlooked the fact that Birrell himself had succeeded in obtaining a suppression order and a direction for return of the seized property, not by virtue of a search of his own premises, but on the theory of "constructive possession." See *United States* v. *Birrell* (S.D.N.Y. 1965), 242 F. Supp. 191. This same theory of "constructive" possession had been accepted by the Second Circuit in *United States* v. *Antonelli Fireworks Co., supra.*

It is important to note that in the instant appeal, counsel in the trial Court had specifically alleged that Birrell had been the attorney representing Granello and Levine and that the records were therefore privileged communications. This not only raised an issue of constructive possession, as in the *Birrell* case, but likewise raises the additional objection that a Fifth Amendment right of self-incrimination or privileged communication could be involved. Thus at the trial, Mr. Klein, one of the attorneys for Granello told the trial Court (S.M. 3/25/65 pp. 29, 30):

> "... Birrell was attorney for the defendants ... I say that he [Birrell] was our attorney; the papers were confidential and privileged and, certainly, the Fifth Amendment precludes their use."

The Trial Court did not even conduct an evidentiary hearing under Rule 41(e) F. R. Crim. P. nor did it make any findings of facts or conclusions of law. Thus, petitioners were precluded from offering evidence that their rights were violated.

The First Circuit in *Rosencranz* v. *United States, supra,* was also (like the Ninth Circuit), obliged to grant a rehearing to resolve the question of "standing" in that case. On the rehearing, it held contrary to the Ninth Circuit, that an illegal search of a truck belonging to one Amorello which had been held to have been unconstitutional in violation of the Fourth Amendment gave "standing" to co-defendants to object to the introduction of evidence seized from that truck. This was based upon the First Circuit's interpretation of this Court's pronouncement in *Jones* v. *United States, supra.* In the cases cited from the District of Columbia Court of Appeals, such as *Schoeneman* v. *United States; Hair* v. *United States,* and others, it appears that that Court of Appeals interprets not only *Jones* v. *United States,* but *McDonald* v. *United States,* as well, as indicating that the broadest interpretation of the question of standing should be applied.

It is interesting to note that this Court apparently did not mention *McDonald* v. *United States, supra* in its decision and opinion in *Jones* v. *United States.* This is particularly surprising in view of the fact that the *McDonald* case is cited in the briefs submitted to this Court on the *Jones* appeal.

We have explained, *supra*, that one of the distinctions that have been suggested by the various Circuits is that perhaps the question of whether or not "contraband" is involved in an illegal search and seizure may be dispositive of whether or not such illegally seized evidence can be used against co-conspirators, co-defendants or others. This was almost intimated in *Diaz-Rosendo* v. *United States, supra,* where marijuana was involved as well as *Bozza* v. *United States* (2 Cir. 1966)—F. 2d Slip opinion 2889, where contraband was likewise involved.

In the instant case, the Court below suggested and apparently held that the government could use the illegally seized evidence which it had obtained from Birrell against Granello and Levine because, in any event, it did have *subpoena power* over those records even if they had been returned as ordered.* This seems to be completely *contrary to this Court's holding in McDonald* v. *United States, supra,* where this Court quite clearly indicated that if the property had been returned to McDonald it would *not* have been available for use at the trial (*McDonald* v. *United States*, 335 U.S. at 456).

The Court of Appeals for the District of Columbia in *Schoeneman* and *Hair* seems to agree with that interpretation, that is, that evidence illegally seized and ordered returned could never be used. This is likewise bolstered by this Court's opinions in *Silverthorne Lumber Company, supra,* and *Wong Sun, supra.*

It must be remembered that where contraband is involved, the government is not required to return property and this

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* See, appendix (App. 12).

specific issue was left open in the *McDonald* case. (See *United States* v. *Jeffers*, 342 U.S. 48, 54; *Trupiano* v. *United States*, 334 U.S. 699, 710; and Rule 41(e) F. R. Crim. P.)

In the case at bar, there is no issue of contraband since the Birrell records were not only suppressed, but were ordered returned to Birrell. Presumably therefore, Birrell would have had custody of these records and the United States could not have used the information obtained thereby against anyone, particularly his former clients and co-conspirators.*

POINT IV

The acquittal of the petitioners of the conspiracy counts after the first trial precluded the government under the doctrine of *res judicata* and double jeopardy from introducing evidence at the second trial of any conspiracy, partnership in crime, joint venture or the like. Despite this fact, however, the trial court permitted the government in the second trial to establish the existence, in essence, of a conspiracy between Granello and Levine.

Before the charge to the jury in the first trial, the government, itself, moved to dismiss the conspiracy counts against Granello and Levine, the petitioners herein. Thereafter, on motion of the petitioners, the trial court entered a judgment of "acquittal" on the conspiracy count in the indictment. During the second trial, it became obvious that the government was seeking to introduce evidence establishing a joint

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* It is undisputed that Birrell was named as a co-conspirator in the original charges at the first trial. Yet the Court below in the case at bar has completely overlooked this fact.

venture or "partnership in crime" between Granello and Levine.

As a matter of fact, the trial court, in the second trial, actually charged the jury that the government never contended that Granello and Levine owned 80% of the Pacheco stock separately, but rather that they owned or controlled it jointly (G. App. 18-a).* Objection was made to the adduction of evidence concerning a conspiracy on the grounds of collateral estoppel and double jeopardy. The trial court refused to grant the motion and permitted the government to continue its case on this theory.

In *Sealfon* v. *United States,* 332 U.S. 575, this Court considered a similar problem and declared that where the crux of the prosecution's case rested upon the existence of a conspiracy which had been found non existent after a first trial, the prosecution was precluded and barred from adducing evidence of a conspiracy under the doctrine of *res judicata* in the second trial.

It seems that the Court below and the prosecution adopted the casuistic argument that a conspiracy was not really being established, but rather the theory of "joint venture" or "partnership" was being advanced. Yet this was the same technique which the government had used in the first trial where the conspiracy counts were extant. This was a distinction without a difference. As Judge Learned Hand said years ago in *Van Riper* v. *United States,* 13 F. 2d 961, 967 (2 Cir. 1926):

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* Under 26 U.S.C. §368(c), control of 80% of the Pacheco stock was a *sina qua non* to establish petitioners' guilt. Without a conspiracy charge, no such proof could be adduced.

> "When men enter into an agreement for an unlawful end, they become *ad hoc* agents for one another, and have made a 'partnership in crime' ".

See also *Krulewitch* v. *United States,* 336 U.S. 440, 445-448 (1949); *Grunewald* v. *United States,* 353 U.S. 391, 394-395 (1957); *Hyde* v. *United States,* 225 U.S. 347 (1912).

Conspiracy has been used repeatedly in tough cases, and throughout the ages it has been responsible for the "admission of evidence otherwise inadmissible". In the case at bar, the prosecution has not contested the fact that substantially the same evidence which was used on the first trial was used in the second trial to prove the so called "joint venture theory", notwithstanding the acquittal on the conspiracy in the first trial.

The trial Court, following the evidentiary portion of the first trial, held that the prosecution had failed to prove the conspiracy or joint venture since the conspiracy counts were removed from the case.

The permission granted to the prosecution by the second trial judge to adduce evidence which the first trial judge had already ruled to be incompetent, violated the doctrine of *res judicata* and exposed petitioners to double jeopardy. See *United States* v. *Oppenheimer,* 242 U.S. 85 (1916); *United States* v. *Ball,* 163 U.S. 662, 669 (1896); *Fong Foo* v. *United States,* 369 U.S. 141 (1962); *Sapir* v. *United States,* 348 U.S. 373, 374 (1955); cf. *Prack* v. *Weissinger* (4 Cir. 1960), 276 F. 2d 446, 450.

In *United States* v. *Kramer,* 289 F. 2d 909, 914, (2 Cir. 1961) Judge Friendly explained that it was wholly improper to force a defendant who had won an acquittal to relitigate the identical question on a further charge arising out of

the same course of conduct. He condemned such a course of action as a clear violation of the rule against double jeopardy and cited English and other historical precedents to substantiate this fact, cf. *Abbate* v. *United States*, 359 U.S. 187 (1959); *People* v. *DeSisto*, 27 Misc. 2d 217 (1961). (Incidentally, the *DeSisto* opinion discusses the entire problem *in extenso*.)

That the petitioners were severely prejudiced by the government's freedom to prove a conspiracy without a count so alleging, is without doubt.

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The ruling by the trial Judge that the defense was barred from even mentioning that there had been an acquittal of conspiracy deprived petitioners of due process of law and a fair trial.

Incredible as it may seem, the trial Court warned the defense not to mention to the jury in summation that the conspiracy count was out of the case as petitioners had been acquitted thereof in an earlier trial (S.M. 2551, 2552).*

At the time that the jury was deliberating, they were so much concerned with the issue of whether an agreement or joint venture (conspiracy) existed that they specifically asked the trial Court (S.M. 2989):

> "If we believe that there was no joint venture involved, does that exonerate Granello entirely?"

The court answered "yes". The talesman must have found a conspiracy.

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* The court of appeals said this was justified to avoid "confusion" (App. 13). An explanatory charge would have eliminated "confusion".

It has already been pointed out that the government never contended that the defendants at trial (petitioners here) ever controlled or owned the requisite 80% of stock individually, but rather that they controlled 80% jointly. Without alleging a conspiracy of some sort, it would seem that no such case could be made out.*

It should be noted that strenuous objections were made to the trial court's ruling and thus no waiver of these points can be inferred. The unfortunate fact is that the trial Judge seemed to be bending over backward to assist the prosecution as distinguished from the defense. For example, 27 pages were devoted by the judge to marshalling the prosecution's evidence, but only 5 to that of the defense (S.M. 2924-2946; 2952-2955).

POINT V

Granello was prejudiced as a matter of law by the refusal of the District Court, following the first trial, to grant his motion for a severance under Rule 8(b), F. R. Crim. P., since he had been acquitted of conspiracy in the first trial. Nothing in common remained in the case.

As a matter of law, petitioner Granello was entitled to a severance under Rule 8(b) F. R. Crim. P. upon his timely motion made prior to the second trial. Whereas Rule 14 is dependent upon an exercise of the Court's discretion,

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* It should be noted that petitioners suggest and maintain that the fact that the Government at the second trial was permitted in essence, to prove a conspiracy sans any such counts in the charges, the petitioners' rights under the Fifth Amendment were violated as they were being tried on those charges without an indictment or information.

Rule 8(b) is mandatory.* The motion for a severance should have been granted as there were no longer any issues common to Levine and himself. Each had a right to a separate trial upon the independent charges pending separately against each.

Without a conspiracy, it was quite impossible to say that Granello willfully withheld filing a return for Levine or vice versa. Each petitioner committed his respective crime alone, or it was not perpetrated at all.

See:

Schaffer v. *United States,* 362 U.S. 511, 576 (1960);

Franklin v. *United States* (App. D.C. 1963), 330 F. 2d 205;

Fernandez v. *United States* (Cir. 9, 1964), 329 F. 2d. 899, cert. denied, 379 U.S. 832;

Cf. *Stirone* v. *United States,* 361 U.S. 212 (1960);

Berger v. *United States,* 295 U.S. 78, 82 (1935).

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* See: *Ingram* v. *United States* (4th Cir. 1959) 272 F. 2d 567; 8 Moore (Cipes), Federal Practice §8.06 at 8-14 and 8-15 (1965).

POINT VI

Petitioners' rights under the Sixth Amendment to confront witnesses and to compulsory process to secure the attendance of witnesses were violated when the trial Judge, in essence, precluded them from calling the essential witness, Birrell.

—A—

The trial court erred in concluding that the defense had to forego calling Birrell because he had indicated that he might invoke the Fifth Amendment against self-incrimination if called. This is a rule binding on the Government, not the defense. Moreover, the Fifth Amendment applies to the *answering* of questions, *not* the *asking*. Birrell was a witness, not a defendant.

The trial judge threatened the defense that if it elected to call Birrell as a witness, the Court would advise the jury that it did so with the knowledge that the Government also wanted to call Birrell but was barred from doing so because Birrell threatened to invoke the Fifth Amendment. Mr. Germaise, one of the lawyers for the defense then said (G. App. 35, 36):

> "I am being completely precluded from using this man because of what your Honor will tell the jury if I do use him, so in effect, I can no longer use him at all for any purpose.
>
> • • • • •
>
> "The Court: . . . I think the same rule should apply to the defense as to the government."

For all intents and purposes, therefore, the defense dared not call Birrell so as not to prejudice their clients. The rule obviously only applied to the government (*Namet* v. *United States*, 373 U.S. 179 (1963)).

The Fifth Amendment guarantees that:

> "No person . . . shall be compelled *in any criminal case* to be a witness *against himself*. . . ."

It is apparent that the language of the Constitution *refers to an accused and not a witness.*

> "Taken by themselves the words *nor can he be compelled to give evidence against himself* are, doubtless, broad enough to include a witness as well as an accused. But occurring in a sentence beginning with the words *in all capital or criminal prosecutions,* and sandwiched as they are between clauses which can only relate to the accused, they seem unmistakably intended to apply only to him: a conclusion which the word *he,* already used just a few words previously to refer unmistakably to the accused, strongly reinforces.
>
> . . . "Quite clearly, had the framers of these provisions intended them to include the witness, the fact that the context might be construed as negativing such a construction would have been apparent to them; and they would have rewritten the provision to remove the ambiguity. One must conclude that the thought that the witness might be regarded as included never occurred to them. And the reason why it did not seems clear." Mayers, *Shall We Amend The Fifth Amendment* (1959) at 187.

In a footnote, the same author notes that the supposition that a "witness" as well as an accused is protected by its terms is probably owing to a misunderstanding of the Amendment:

> "It [the privilege against self-incrimination] was in fact unknown in the nineteenth century. It does not occur in either of the two historic Supreme Court

> decisions on the privilege toward the end of that century (the Boyd decision in 1886 and the Counselman decision in 1892). It does not occur in the 1891 edition of Story's *Commentaries on the Constitution* or in the 1893 edition of Greenleaf's *Evidence*—both standard works of the period."
>
> *Mayers,* id. at 311, 312 footnote 16.

Thus, in addition to the fact that petitioners were not given a severance, the trial judge did not allow them to question the one witness who could have exculpated them entirely or at least attenuated the virulent effect of the unlawfully seized evidence.

In light of the extraordinary hardship caused petitioners by such supposition in this case, the question is raised whether this Court should not grant certiorari and review this exceedingly important question in the administration of federal criminal justice.

Even if it be conceded that the privilege against self-incrimination protects witnesses, other serious questions are raised by the trial court's actions.

In *United States* v. *St. Pierre,* 132 F. 2d 837, 840 (CA 2, 1942), Judge Learned Hand observed:

> "The result of using this, like any other privilege, is to deprive people of evidence which would be otherwise available; at best, a disastrous necessity, for disputes ought to be settled so far as they can by resort to the whole truth."

The privilege is designed and interpreted "to protect the innocent" even though it may prove "a shelter to the guilty." *Twining* v. *New Jersey,* 211 U.S. 78, 91 (1908).

Even if the witness had the privilege to invoke, the Court committed egregious error in denying petitioners the right to put the questions to the witness *in the presence of the jury.*

Petitioners did not intend to, and could not, abuse the opportunity to question the witness despite his expressed intention to invoke the Fifth Amendment. They only sought permission to put questions to the witness.

The trial judge acted on the erroneous premise that the Fifth Amendment prohibits inquiry.

However, the Court was plainly wrong. The witness was merely privileged not to answer them—as probative as they were. Actually, "except in the case of an *accused* in a criminal case [for an accused cannot be called as a witness, the privilege against self-incrimination] is merely an *option of refusal, not a prohibition of inquiry.*" 8 *Wigmore on Evidence* (3d Ed) § 2268, p. 402.

> "The right to trial by jury includes the right to have the jury present when competent questions are propounded to a witness. While a witness may refuse to answer if the answer would tend to incriminate him, yet the privilege does not bar the asking of the question." *O'Chiato* v. *People,* 214 Pac. 404, 405 (Sup. Ct. Colo., 1923). See also, *Hinds* v. *John Hancock Mutual Life Ins. Co.,* 155 A. 2d 721, 723 (Maine, 1959).

In *United States* v. *Benjamin,* 120 F. 2d 521 (CA 2, 1941), it was held that a witness, as compared to an accused, does not have the constitutional privilege of refusing to take the witness stand, but only the privilege of declining to give answers, when interrogated. Judge Augustus N. Hand, writing for the Court stated (at 522):

> "It is to be remembered that the appellant had not the constitutional privilege to refuse to testify which belongs to a defendant on trial. He was subject to call as a witness and only had the right of any witness to decline to give answers when interrogated which might tend to incriminate him. O'Connell *v.* United States, 2 Cir., 40 F. 2d 201, 205; Mulloney *v.* United States, 1 Cir., 79 F. 2d 566. As Professor Wigmore has said, the privilege is 'an option of refusal and not a prohibition of inquiry'. Wigmore Evidence 2d Ed.,§ 2268."

Accord:

United States v. *Housing Foundation of America,* 176 F. 2d 665 (CA 3, 1949);
O'Connell v. *United States,* 40 F. 2d 201, 205 (CA 2, 1930);
United States v. *Miller,* 80 F. Supp. 979, 981 (E.D. Pa., 1948).

The Sixth Amendment again met with disfavor at the hands of the trial Judge. He made empty petitioners' right to "compulsory process for obtaining witnesses in his favor." If the Court were obliged to balance the privilege of the witness under the Fifth Amendment with petitioner's right to process for obtaining witnesses in his favor, guaranteed by the Sixth Amendment, it should have at least afforded petitioners a right to put questions to the witness in front of the jury. The Court still could have enforced the witness' right not to answer, provided he invoked the privilege.

By its action, the trial court also deprived petitioner of the right to inquire of the witness under oath whether his assertion of the Fifth Amendment privilege was in good faith. Perhaps it was induced by others—perhaps the prosecutor.

POINT VII

The Government inadvertently or perhaps deliberately precluded an important exhibit from going to the jury room as required. It was found on the prosecutor's desk after the verdict. (Exh. NN-Levine)

In addition, the Court erred in denying a motion for a new trial on newly discovered evidence.

At the trial, the jury was presumably furnished with all exhibits. Yet after the trial jury returned its verdict, the defense discovered that Levine's exhibit NN was not among the exhibits but that it had been retained by the prosecutor (*Berger* v. *United States, supra*).

When petitioners moved for a new trial on the grounds of newly discovered evidence and in the interests of justice, they grounded their motion on the discovery among the Birrell records of the minutes of a meeting of the board of directors of Lomega Explorations, Ltd, under date of May 2, 1956, authorizing the repayment to Birrell & Larson of funds advanced by that law firm for Lomega's acquisition of the assets of Pacheco. Petitioners contend that this document gives the source to the true nature of the transaction herein, and it negatives any tax fraud claim gainst them. Mr. Birrell's letter of transmittal likewise negates the theory of the government, pointing out that the files of Birrell and Larson contained a complete explanation of this transaction. In connection with this motion, under Rule 33, Federal Rules of Criminal Procedure, petitioners sought a pre-trial discovery under Rule 16, Federal Rules of Criminal Procedure, and an evidentiary hearing thereon.

The trial Judge wrote an opinion stating that petitioners were entitled to pre-trial discovery, but at the same time denied the evidentiary hearing. He then dismissed the motion without any decision on the merits.

Petitioners contend that the failure to grant them an evidentiary hearing deprived them of the substance of the right to prove their contentions for a new trial. See, *Remmer* v. *United States,* 347 U. S. 227 (1954). In cases such as this, where suppression of evidence is claimed, an evidentiary hearing on this point appears to be mandatory. *Kyle* v. *United States,* 297 F. 2d 507 (2nd Cir., 1961). Failure to grant such evidentiary hearing, and the pre-trial discovery to make the hearing meaningful, was prejudicial error against petitioners.

CONCLUSION

For the reasons stated above, it is prayed that a writ of *certiorari* issue to review the judgments of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 404-5—September Term, 1965.

(Argued May 27, 1966 Decided August 3, 1966.)

Docket Nos. 30005/6

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE GRANELLO, a/k/a Sally Burns, and HYMAN LEVINE, a/k/a George Levine,

Appellants.

Before:

MOORE, FRIENDLY and HAYS,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Edward J. Dimock, *Judge,* convicting defendants, after a verdict, of wilfully failing to file income tax returns for 1956 and 1957 in violation of 26 U. S. C. §7203. Affirmed.

FRIENDLY, *Circuit Judge*:

Salvatore Granello and Hyman Levine appeal from their convictions, after a joint trial before Judge Dimock and a jury in the District Court for the Southern District of New York, for wilfully failing to file income tax returns for 1956 and 1957 in violation of 26 U. S. C. §7203. We affirm.

Charges against the defendants were first made in a five count information. Counts 1 and 2 alleged Granello's failure to file returns in 1956 and 1957 despite the receipt of gross income approximating $118,500 and $97,000 in those years. Counts 3 and 4 made the same charges against Levine, whose gross income for the two years was claimed to approximate $132,750 and $97,000. Count 5 alleged a conspiracy among Granello, Levine and Lowell M. Birrell to violate §7203 by failing to make the returns and to supply required information to the Internal Revenue Service. A later three count indictment charged both defendants with unlawfully attempting to evade taxes for 1957 in violation of 26 U. S. C. §7201 and also a conspiracy to defraud the United States by impeding the lawful functions of the Treasury Department in collecting income taxes by concealing the sources of their income and the nature of their business activities.

The information and the indictment were consolidated by consent, and were first tried before Judge Murphy and a jury. The conspiracy count in the information was dismissed on the Government's motion, and the similar count in the indictment on the defendants'. The jury hung on the substantive counts and a mistrial was declared. After the

case was reassigned to Judge Dimock, Granello made a motion for a severance, which was denied. At the second trial, the jury found each defendant guilty on each of the two substantive counts in the information; it hung on the substantive counts of the indictment. Judge Dimock imposed fines and consecutive sentences of one year, the maximum term of imprisonment permitted, on each count on which defendants were convicted.

The Government's claim that Granello and Levine received large capital gains in 1956 and 1957 from their sale of stock of Pacheco Petroleum Company, a Cuban corporation, was supported by evidence which warranted the jury in finding as follows: In May 1955 Pacheco, which then had outstanding only 5,000 shares held by its founder Trueba, issued 2,000,000 shares to Levine for oil leases on properties in Cuba acquired without cost to himself. In August, at the next Pacheco stockholders' meeting, Levine was elected treasurer and Granello chairman of the executive board;[1] the new officers adopted a resolution for the issuance of another 1,000,000 shares for leases on mining concessions. Early in September Granello entered into a leasing agreement with Maniabon Petroleum Company under which he obtained oil concessions to be operated on a 12% royalty basis; Granello deposited with Maniabon 125,000 shares of Pacheco stock, these being part of the 2,000,000 previously issued to Levine, on a stipulation that they would be returned on his furnishing a $25,000 bond. Granello immediately assigned these leases to Pacheco,

[1] The records of the meeting showed Granello as holding 668,000 of the 2,000,000 shares originally issued to Levine.

which issued 1,000,000 shares to him and assumed his obligations under the contract.

Early in 1956 Granello and Levine sold 2,000,000 of their Pacheco shares to Birrell, whom they had met in connection with efforts to exploit the leases, for cash and shares in one of Birrell's companies, Lomega Gold Mines, Ltd.; Birrell guaranteed that the Lomega shares would be saleable so that defendants' total yield would be in excess of $400,000. Payments aggregating $120,000 were made in 1956, sometimes by checks to the order of Granello or Levine, sometimes by funds from checks drawn to cash. The Lomega stock, however, proved not to be saleable at the expected price, and defendants pressed Birrell for satisfaction. A signed agreement, dated December 7, 1956, provided that Birrell would immediately give Granello and Levine $50,000 in cash, five checks dated December 7 aggregating $25,000, and undated checks for $75,000 which were not to be cashed without notice to Birrell; that commencing February 5, 1957 and monthly thereafter Birrell would pay $30,000 to defendants jointly until satisfaction of the amount originally due and owing—an estimated maximum of $450,000 but subject to adjustments to be settled six months later; and that security for this obligation would be provided on or before February 5, 1957. The checks promised for December 1956 were issued payable to Levine and Granello and deposited that month. Payments of $194,000 were received in 1957. With the inclusion of a sale of 30,000 shares to one James Cooper, defendants received from the sale of Pacheco stock $226,550 in 1956 and $194,000 in 1957. If this was divided equally and treated as long-term capital gain on the sale of

property having a zero basis, each would have owed some $23,000 in taxes for 1956 and $17,000 to $18,000 for 1957. No returns were filed or taxes paid by either.

Little time need be spent on defendants' contention that no taxable income was shown. One claim is that because they did not own 80% of the company's voting stock as required by §368 of the Internal Revenue Code, the 1955 transactions between them and Pacheco were not tax free reorganizations preserving their zero basis and postponing all tax consequences until the later years when the stock was actually sold, but gave rise to taxable income then and there. Insofar as this argument measures control with reference to unissued Pacheco shares, it is too frivolous to warrant discussion. That alone is enough to dispose of Levine's claim since even if he were acting separately from Granello as he contends he must be found to have been, the transfer of the leases would have made him the owner of all Pacheco's shares except the 5,000 then held by Trueba. But evidence that we have recited, and more that we have not, amply warranted a finding that Levine and Granello were equal partners in the entire Pacheco venture, a fact which, as will shortly be shown, the Government was not prevented from proving. Indeed it is immaterial whether the receipts were divided equally; the Government traced $70,900 to Granello in 1956 and $67,000 in 1957, so that even if all the balance went to Levine, each had gross income far exceeding the $600 requiring a return. 26 U.S.C. §6012. There is likewise no merit in the claim that the entire purchase price was received in 1956 so that no income was realized in 1957 with the consequence that the counts relating to the later year must fall. Birrell's promise "was not

embodied in a note or other evidence of indebtedness possessing the element of negotiability and freely transferable." *Ennis* v. *C. I. R.*, 17 T. C. 465, 470 (1951), see *Bedell* v. *C. I. R.*, 30 F. 2d 622, 624 (2 Cir. 1929), and the deferred payments were includible in income only when received. 2 Mertens, Federal Income Taxation §11.05, at 9, 12-13; §12.124, at 376-77. Indeed, the exact price was still uncertain at the end of 1956.

Defendants argue with great earnestness that the dismissal at the first trial of the conspiracy counts charging them with having combined to conceal and not to report their income precluded the Government from showing at the second trial that they had combined to make it. Mere statement of the contention sufficiently reveals its fallacy. The doctrine of collateral estoppel "makes conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision." *Yates* v. *United States*, 354 U. S. 298, 336 (1957). Even if we assume that the dismissal of the conspiracy counts was on the merits, the essential determination was simply that Granello and Levine had not unlawfully agreed to conceal their income or to default in filing returns—not at all that they had not agreed to join in the lawful activity of producing the income by obtaining the Pacheco shares and then selling them. The decision in *Sealfon* v. *United States*, 332 U. S. 575, 580 (1948), rested on the special circumstance that the Government's case at the second trial against the alleged aider and abettor of the substantive crime required it to prove the very agreement relied on to show conspiracy "which was necessarily adjudicated in the former trial to be non-existent." See also *United States* v. *Kramer*, 289 F. 2d 909, 915-20 (2 Cir. 1961).

This brings us to the most substantial point in the case, the denial of Granello's motion for severance after the mistrial. F. R. Cr. P. 8(b) permits a joinder of defendants "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." We have difficulty with the Government's argument that this permitted joinder of the two defendants even apart from the conspiracy count. Whereas Rule 8(a) allows joinder of offenses if these are of the same or similar character or "are based on the same act or transaction or on two or more transactions connected together or constituting part of a common scheme or plan," Rule 8(b) relating to joinder of defendants is more narrowly drawn. See 8 Moore (Cipes), Federal Practice §8.06 at 8-22 & 8-23 (1965); Orfield, Joinder in Federal Criminal Procedure, 26 F. R. D. 23 (1961). Under Rule 8(b) it is not enough that the defendants participated in the same act or transaction or series of them; they must have engaged in the same act or series of acts "constituting an offense or offenses."[2] The very basis so clearly sustaining the Government's position against foreclosure by collateral estoppel, namely, that acts or transactions relating to the earning of income were not what was previously adjudicated to have not occurred, cuts against it here; joint participation in the "series of acts or transactions" resulting in the receipt of income for the Pacheco shares does not satisfy Rule 8(b) since they did not constitute an offense. The decision in *Turner* v. *United States*, 222 F. 2d 926 (4 Cir.),

[2] Despite the rather inept drafting, we read the "constituting" clause as applying to "the same act or transaction" as well as to "the same series of acts or transactions." But see *United States* v. *Charnay*, 211 F. Supp. 904, 905 (S.D.N.Y. 1962).

cert. denied, 350 U.S. 831 (1955), on which the Government heavily relies, is inapposite because the court regarded the case as one in which the indictments there consolidated had charged the defendants with jointly falsifying records and filing false returns of partnership income whence the false individual returns sprang; this likewise seems to have been the rationale of *United States* v. *Manno*, 118 F. Supp. 511, 514 (N. D. Ill. 1954). See also *Cataneo* v. *United States*, 167 F. 2d 820 (4 Cir. 1948). And at least one court has rejected the Government's position on facts which from the meager report do not appear reasonably distinguishable from those before us. *United States* v. *Harvick*, 153 F. Supp. 696 (D. N. D. 1957).

The Government is thus forced to fall back on a second line of defense, namely, that joinder of the defendants initially was within Rule 8(b) because of the conspiracy counts in the information and indictment and that this relegated them to Rule 14 providing discretionary relief from prejudicial joinder. The Government is surely right on the first point, and, under the rule in *Schaffer* v. *United States*, 362 U.S. 511 (1960), would also be on the second, if the issue before us were a refusal to grant a motion to sever at the first trial after dismissal of the conspiracy counts when the case was ready for submission to the jury. Although it has been argued that *Schaffer* ought not to be applied to a retrial on substantive counts after the charges of joint participation have been eliminated by a prior adjudication, 8 Moore, *supra* at 8-39 & 8-40,[3] this court appar-

[3] The argument is quite persuasive where the trier of the facts has determined the lack of joint criminal activity or the judge has clearly held the evidence insufficient to permit such a determination. What gives pause is that trial judges so often withdraw conspiracy counts from the jury without detailed analysis of the evidence and simply to avoid confusion, either with the consent of the prosecution or without serious objection.

ently has held otherwise. *Application of Gottesman*, 332 F. 2d 975 (2 Cir. 1964);[4] see 8 Moore, *supra*. We are unable to follow Granello's attempt to distinguish that decision on the basis that the perjury counts against the co-defendants concerned the same subject matter, namely, a meeting with Garfield and Swann at the same time and place; whether Gottesman and Cohn had or had not attended the meeting, this would not have been an offense and, with the conspiracy count out of the case, the charges were of two separate perjuries regarding its occurrence—just as here the charges are of separate wilful failures to report the jointly earned income. On the other hand, the *per curiam* decision in *Gottesman* may well have been based in some part on doubt as to how far Judge Dawson's dismissal of the conspiracy count at the close of the first trial represented a considered determination that sufficient evidence of joint action had not been produced, as distinguished from an attempt to simplify the jury's task.[5] When double jeopardy rather than collateral estoppel is the sole bar to submitting the conspiracy charge to a second jury, there is a stronger case under *Schaffer* for not granting severance as a matter of right; in such a case a court might still be able to look to the original information or indictment as characterizing the

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[4] Judge Hays thought that the case was not appropriate for mandamus and that the petition should have been denied on that ground without reaching the merits. 332 F. 2d at 976.

[5] The Government's affidavit opposing mandamus recited that "Judge Dawson stated on the record that he was dismissing the count solely as a matter of law and not on the facts, and stated that he thought the submission of the conspiracy count would confuse the jury." See note 3 *supra* and 8 Moore, Federal Practice at 8-40 n. 56. Acquittal of both defendants at the second trial mooted the issue as to severance.

crime and affording a basis for joinder under Rule 8(b) even though the guarantee against double jeopardy prevents conviction for conspiring.

We need not debate, however, whether *Gottesman* should be thus limited or decide what the result would be in this case if it were. Even if we were to assume *arguendo* that Granello's motion to sever after the mistrial should have been granted, we perceive no prejudice from its denial. The evidence of joint action by the two defendants was sufficient to have permitted the Government to introduce at separate trials the same proof that it offered at the joint one; despite the common misconception, the admissibility of acts on a partner rests on basic principles of agency and not on the presence of a conspiracy count. See *United States* v. *Pugliese,* 153 F. 2d 497, 500 (2 Cir. 1945); *United States* v. *Annunziato,* 293 F. 2d 373, 378 (2 Cir.), cert. denied, 368 U. S. 919 (1961); *United States* v. *Costello,* 352 F. 2d 848, 854 n. 4 (2 Cir. 1965), cert. granted on another point, 383 U.S. 942 (1966). The jury here was carefully instructed that the issues as to each defendant must be determined separately.

We see no reason why the undoubted truth that an appeal claiming misjoinder under Rule 8(b) raises a question of law in the strict sense, whereas an appeal from denial of severance under Rule 14 normally raises only one of abuse of discretion, should carry exemption from the harmless error rule, F. R. Cr. P. 52(a), as a corollary. We do not consider *Ingram* v. *United States,* 272 F. 2d 567 (4 Cir. 1959), approvingly cited in 8 Moore, *supra* at 8-14 & 8-15, as so holding, to establish any such general principle; the

joinder in that case was of two sets of defendants whose offenses were "in no way connected," and the Government's introduction against one set of proof wholly irrelevant to the other was plainly prejudicial. Similarly the decision in *McElroy* v. *United States*, 164 U. S. 76, 80-81 (1896), with respect to the defendants named in all the indictments consolidated for trial, rested upon a conclusion that they may indeed have been embarrassed and prejudiced in their defense, or the attention of the jury distracted, by the evidence of "distinct and independent transactions." See also *Ward* v. *United States*, 289 F. 2d 877 (D. C. Cir. 1961). In the *Schaffer* case the Court implied that the harmless error rule is applicable to questions of improper joinder when it observed that the rule was not reached there because "the joinder was proper under Rule 8(b)" and no error was shown. 362 U.S. at 517. Here, where the Government could have proved the receipt of income by both on the trial of either and the jury was appropriately instructed, no prejudice from the joinder could have occurred.

Much of the Government's evidence to show defendants' receipt of income consisted of cancelled checks, checkbooks, and other records obtained by a seizure of Birrell's books and papers in July and August of 1959. Granello and Levine sought, seasonably but unsuccessfully, to suppress this evidence against them because of the alleged illegality of the search and seizure under the Fourth Amendment. When, after the verdict, another district judge granted a motion by Birrell for suppression of the seized records, *United States* v. *Birrell*, 242 F. Supp. 191 (S.D.N.Y. 1965), Granello and Levine renewed their application be-

fore Judge Dimock as a motion in arrest of judgment; he denied it on the ground that they lacked standing to avail themselves of any illegality in the Government's seizure of Birrell's records, 243 F. Supp. 325 (1965).

We need not reiterate what we have recently said as to standing in *United States* v. *Bozza*, —— F. 2d ——, —— (2 Cir. 1966), slip opinions, 2889, 2916-20, or repeat the citation of the authorities there assembled. Granello and Levine have not shown that any of the papers held to have been unlawfully seized from Birrell were theirs; he stood toward them not as a partner but as a buyer. If Birrell had regained the seized records before their trial, these would have been subject to subpoena for a purpose not prejudicial to him. Defendants are mistaken in their reliance on the statement in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all"; Mr. Justice Holmes was speaking of an effort to require owners of records illegally seized by the Government to produce them after their return pursuant to a subpoena prepared from copies made during the illegal possession. Defendants' complaint is simply that the Government's awareness of their crime and its knowledge of how to establish it were fruits of a seizure that has been found at *nisi prius* to be illegal as against someone else. Sustaining this position would mean that if an illegal seizure of one man's records revealed a plot by others to kill a high public official or to overthrow the Government, the Fourth Amendment would prevent use of the records against the plotters.

We cannot believe the founders meant to go so far; it suffices that the seized property and its fruits should be sterilized as against the victims of the unlawful action. See *Jones* v. *United States*, 362 U.S. 257, 261 (1960).

The defendants next challenge several rulings that they insist undermined their efforts to mount an effective defense. The judge, having ascertained by an examination outside the presence of the jury that Birrell would claim his privilege against self-incrimination with respect to any question by the prosecution or the defense, ruled that the Government could not call him, cf. *Namet* v. *United States*, 373 U.S. 179 (1963). He also stated that if the defendants chose to call Birrell, he would tell the jury that the Government had been precluded from calling him because of his declared refusal to testify, thereby eliminating any adverse inference the jury might otherwise draw from its failure. This in no way deprived the defendants of their right to call Birrell; it deprived them only of power to make or suggest an unfair argument if they did. The judge's instructing defense counsel that they were not to argue dismissal of the conspiracy count was likewise proper in the interest of preventing confusion. Defendants' numerous other objections to Judge Dimock's eminently fair conduct of the trial do not warrant discussion.

The final complaint concerns the denial of a motion for a new trial on the ground of newly discovered evidence. Several months after the conviction Granello's counsel wrote Birrell, stating Granello had advised him that monies received by him and Levine from Birrell represented not the purchase price of the stock but advances to them as agents for Pacheco in connection with Lomega's acquisition

of its assets. He inquired whether Birrell's examination of the suppressed files had disclosed any records "which would clarify the true nature of such transactions between the two corporations and my client and his co-defendant." The letter also asked whether Birrell had found electric logs of the Pacheco wells. Birrell promptly gave an affirmative answer as to the logs; in response to the more important question, he enclosed a copy he had made of minutes of a Lomega board meeting held September 20, 1956. These recited that the president of Lomega had "prearranged" the acquisition of the assets of Pacheco by a subsidiary as suggested at a prior Lomega board meeting in May and, to that end, Lomega had advanced $205,000 to Birrell & Larson and $75,000 to S & C Trading Co., Inc.; it was voted that Birrell & Larson and S & C Trading Co. should reimburse Lomega for these sums and look to the subsidiary for payment. On the basis of this correspondence, defendants moved for discovery of the Birrell files and an evidentiary hearing in support of a motion for a new trial. Construing F. R. Cr. P. 16 as including a post-trial application for discovery, Judge Dimock denied the motion; defendants did not press their application for a new trial apart from discovery and an evidentiary hearing, and this was dismissed.

The locating of the electric logs among Birrell's papers clearly afforded no basis for post-trial relief. Evidence at the trial had indicated these were in the Government's possession and could have been produced on request. Moreover, the only purpose that would have been served by their production would be to show the value of the leases at the

time of their transfer to Pacheco; this was irrelevant since, as we have held, the basis for defendants' Pacheco stock was the cost of the leases, namely nothing, rather than their value at the date of transfer. The judge was likewise justified in concluding that the Lomega minutes afforded no sufficient probability of exculpation to warrant the relief sought. Acquisition of Pacheco's assets by a subsidiary of Lomega was in no way inconsistent with defendants' having earlier sold the bulk of their Pacheco stock to Birrell; indeed the free and easy tone of the minutes suggests that the company was already in his control. The agency theory, which was propounded in and rejected at trial, runs counter to the written agreement of December 7, 1956, and fails to account for Birrell's possession of certificates for the 2,000,000 shares; and the payments recited in the minutes bear no apparent relation to those proved to have been received by defendants and to have been treated by them as their own property.

Affirmed.

APPENDIX B

Judge Dimock's Opinion on Appellants' Motion to Suppress

[Same Title]

OPINION

DIMOCK, D.J.

These are motions by defendants Granello and Levine attacking their indictment for evasion of income tax and their conviction of failure to file income tax returns. The attack is based upon the introduction before the grand jury and at the trial of papers which have since been held to have been illegally obtained from one Lowell M. Birrell. The motions raise the difficult and unsettled question whether evidence which has been held to have been obtained from A in violation of A's constitutional rights not to be subjected to unreasonable searches and seizures is admissible against B.

The facts are these.

On April 11, 1963 an information under Section 7203 of Title 26, United States Code was filed against the defendants charging each of them with failure to file returns in connection with income received for each of the years 1956 and 1957. In addition the information contained a conspiracy count.

On March 9, 1964 an indictment under Section 7201 of Title 26, United States Code was returned against the defendants charging each of them with wilful evasion of tax

in connection with 1957 income. In addition the indictment contained a conspiracy count.

The charges in both information and indictment first came on for trial in September, 1964 before Judge Murphy. On the morning when trial was to commence, the defendants moved to suppress for use as evidence against them all of the papers seized in Bucks County, Pennsylvania, during July and August of 1959 by means of compulsory process directed at Lowell M. Birrell. The files, records and information so obtained related to Birrell's manifold enterprises and the various entities, corporate and non-corporate, through which he operated.

Judge Murphy reserved decision on all issues raised by the motion and the case proceeded to trial. Before submission to the jury, the conspiracy counts were dropped, the information conspiracy count on the Government's motion and the indictment conspiracy count on that of Judge Murphy. The jury in this first trial was unable to agree on a verdict, and, at this juncture, Judge Murphy declined to decide the reserved motion.

Subsequently Birrell moved to have the seized documents suppressed as evidence against him and returned to him and to have various indictments against him dismissed. Neither the indictment, nor the information here charges Birrell. Consequently, neither was made by Birrell the subject of his motion. That motion came on to be heard before Judge Wyatt on November 30, 1964 and decision was reserved. This was the status of the matter when the indictment and information against Granello and Levine were assigned to me for trial.

Appendix B—Judge Dimock's Opinion on Appellants' Motion to Suppress

Shortly before the date set for trial, the defendants renewed before me the motion left undecided by Judge Murphy. In addition, they asked the trial be postponed pending the rendition by Judge Wyatt of decision on the Birrell motions.

Having determined that Granello and Levine were not persons against whom the search for the Birrell records were directed or victims of the seizure but merely persons claiming prejudice through use of evidence gathered as a consequence of a search and seizure directed at another, I concluded that, under the test outlined in United States v. Jones, 362 U.S. 257, 261 (1960), they lacked standing to challenge the lawfulness of the seizure. Hence, I denied the motions and directed that the case proceed to trial as scheduled.

After a trial of some five weeks duration, verdicts of guilty were returned against each of the defendants on each of the information counts. The jury was, however, unable to agree on a verdict with respect to the indictment counts. These remain open.

The great bulk of the evidence adduced by the Government at trial consisted either of documents obtained by the Bucks County seizure or of information derived therefrom, and I think it undisputed that no conviction could have been obtained without this evidence.

The defendants renewed their motions to suppress at various times throughout the trial and again on May 24 when post-trial motions were heard and do not at this point concede the correctness of the ruling I made originally and have consistently adhered to.

Appendix B—Judge Dimock's Opinion on Appellants' Motion to Suppress

Judge Wyatt handed down, on June 11, 1965, his decision granting the Birrell motion to suppress.*

Promptly thereafter, the defendants on the strength of that determination brought the motions considered here.

It will be of assistance at the outset to make it clear that the question raised is not the familiar one whether B who seeks to have evidence against him excluded has standing to raise the point that the seizure of the evidence from A violated A's constitutional rights. Jones v. United States, supra. Here that question has been raised and decided on motion of one who had the requisite standing. We are here faced with the question whether evidence which has been held to have been obtained from A in violation of A's constitutional rights is admissible against B.

Various answers to that question have been suggested in the opinions of the courts.

The first and simplest answer that has been suggested is that the Government cannot use against anyone evidence that has been illegally seized. This was the view taken by Justice Rutledge in his concurring opinion in McDonald v. United States, 335 U.S. 451, 456-57 (1948). That view has, however, been expressed by no other judge.

A second answer that has been made is that evidence seized in violation of A's rights could be used against B if it were physically available. This I understand to have been the view of the four justices who concurred on the subject

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* Subsequent to the argument on June 22 of the instant motions, he granted reargument but adhered to his June 11 decision. While decision is still reserved on Birrell's motion for return of the seized documents, this decision, as this opinion will indicate, will not offset my determination here.

of use of illegally seized evidence in their opinion in the McDonald case where there was no majority opinion on this point.

A corollary of this view is that evidence seized in violation of A's rights can be used against B where it is contraband or where for some other reason A is not entitled to its return. This was suggested by the Court of Appeals for the Second Circuit in United States v. Lee Wan Nam, 274 F. 2d 863 (1960). There, where narcotics seized from A in violation of A's rights were held admissible against B, the court distinguished the McDonald suggestion by saying "[i]f the property had been returned to McDonald, it would not have been available for use at the trial" while, in the case before it, the contraband narcotics "could not be returned despite the illegal seizure." In another case, however, Hair v. United States, D.C. Cir., 289 F. 2d 894 (1961), the court refused to construe anything in the McDonald case as indicating that the question turned on availability of the evidence to the Government and held that it was error to permit stolen goods which had been seized from A in violation of A's rights to be used against B.

A third possible answer to the problem would be that the fact that a seizure violated A's rights would never render the seized evidence inadmissible against B. That seems to have been the view taken by the Supreme Court in Wong Sun v. United States, 372 U.S. 474 (1963), a case decided after all those cited above. There the Government had got possession of narcotics from one Yee as a result of information obtained from defendant Toy in violation of Toy's rights. The narcotics were admitted as against both

Toy and defendant Wong Sun. The court held that Toy's conviction must be reversed because of the admission of the illegally obtained evidence. Though Wong Sun's conviction was reversed on another ground, the Court stated that the narcotics were properly admitted as against him, saying, p. 492, "The exclusion of the narcotics as to Toy was required solely by their tainted relationship to information unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at the trial."

It is true that the result that the narcotics were properly admitted as against Wong Sun might have been reached on the theory espoused by the four justices in the McDonald case since the narcotics as contraband would not have been surrendered by the Government and would have been available in a prosecution of Wong Sun. The Supreme Court did not mention this theory, however, and indeed did not refer to the McDonald case at all.

I regard the expression of the Supreme Court in the Wong Sun case as announcing the rule that the fact that evidence has been seized from A in violation of A's rights does not prevent its admission in a prosecution of B.*

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* This would accord with the statement of Justice Frankfurter in the opinion of the court in Wolf v. Colorado, 328 U.S. 25, (1949) where he said at pp. 30-31, "Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found," a statement unaffected by the court's departure from the Wolf decision in Mapp v. Ohio, 367 U.S. 643 (1961).

Appendix B—Judge Dimock's Opinion on Appellants' Motion to Suppress

The Court of Appeals for the Fifth Circuit seems to have leaned toward that view in Staples v. United States, 320 F. 2d 817 (1963). There the court quoted the matter above extracted from the Wong Sun opinion and stated that keys and a money order receipt held to have been illegally seized from defendant McNamara's automobile may have been admissible against defendant Staples. Other evidence which had been admitted was held to have been illegally seized from Staples motel room, however, so that his conviction was reversed.

The rule must be either that evidence seized from A in violation of A's rights must never be admissible against B or that evidence so seized must always be admissible against B. There is no practical basis for the suggestion of the four justices in the McDonald case that the answer depends upon the availability of the evidence for presentation to the court after a determination of the illegality of the seizure. In the McDonald case, even if the seized property had been returned to McDonald it would have been available to the Government by means of compulsory legal process. There is no such thing as property unavailable to the Government except property that has been destroyed, and destruction can be prevented by the service of compulsory process on the aggrieved party at the same time that the illegally seized property is returned to him.

That leaves the question whether the illegality always works inadmissibility in the prosecution of B or never works inadmissibility in the prosecution of B.

To support the rule that illegality always works inadmissibility it is of no assistance to say that evidence ob-

tained in violation of someone's rights is the fruit of a poisonous tree and thus has a special status like the mystical status of deodand given by the common law to a chattel which had caused death. That is merely another way of expressing a possible result of the consideration of the question which must be decided in the light of public interest.

The only tenable basis for the rule that illegality always works inadmissibility would be a determination that the policy against illegal searches and seizures by the Government was so strong that the law ought to deter the Government from conducting such searches and seizures by prevention of the use of their fruits in any way.

Deterrence of official illegality has been the primary reason for the raising to constitutional dignity of the exclusionary rule as it has been applied up to now. Compare Mapp v. Ohio, 367 U.S. 643, 655-56 (1961), with Wolf v. Colorado, 338 U.S. 25, 28 (1949). This policy that, in Cardozo's phrase, "the criminal is to go free because the constable has blundered", People v. DeFore, 242 N.Y. 13, 21, 150 N.E. 585, 588 (1926), has been thought by many to be an unwise and inefficient sanction, one which inhibits the proper protection of the public and distributes incidental benefits to wrongdoers far more than it safeguards the properly cherished right of privacy. Whatever view be taken as to the wisdom or efficiency of the rule as it has been applied up to now, it is clear that to broaden it, as defendants seek, to include as incidental beneficiaries of the deterrence policy persons whose privacy rights were wholly unaffected by the official illegality would render the rule at

least a far more inefficient sanction. Perhaps such a broadening is desirable but that is a matter ultimately for the Supreme Court and on the present state of the authorities I cannot anticipate its doing so.

The motions are denied.

Dated: July 1, 1965

E. J. Dimock
United States District Judge

APPENDIX C

Constitutional Provisions, Statutes and Rules Involved

Constitution of the United States

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law;

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code

§371 *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United

States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned nor more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 26, United States Code. (1954 IRC)

§351 *Transfer to corporation controlled by transferor*

(a) *General Rule*

No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation and immediately after the exchange such person or persons are in control (as defined in section 368 (c)) of the corporation. For purposes of this section, stock or securities issued for services shall not be considered as issued in return for property.

§368 *Definitions relating to corporate reorganizations.*

(c) *Control*

For purposes of part I (other than section 304), part II, and this part, the term "control" means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at

least 80 percent of the total number of shares of all other classes of stock of the corporation.

§453 *Installment method.*

(a) *Dealers in personal property.*

Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(b) *Sales of realty and casual sales of personalty.*

(1) *General Rule.*

Income from—

(A) a sale or other disposition of real property, or

(B) a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding $1,000, may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

Paragraph (1) shall apply—

(2) *Limitation.*

(A) In the case of a sale or other disposition during a taxable year beginning after December 31, 1953 (whether or not such taxable year ends after the date of enactment of this title), only if in the taxable year of the sale or other disposiiton—

(i) there are no payments, or

(ii) the payments (exclusive of evidences of indebtedness of the purchaser) do not exceed 30 percent of the selling price.

§1001 *Determination of amount of and recognition of gain or loss*

(a) *Computation of gain or loss*

The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount realized.*

The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received. In determining the amount realized—

(1) there shall not be taken into account any amount received as reimbursement for real property taxes which are treated under section 164 (d) as imposed on the purchaser, and

(2) there shall be taken into account amounts representing real property taxes which are treated under section 164 (d) as imposed on the taxpayer if such taxes are to be paid by the purchaser.

(c) *Recognition of gain or loss.*

In the case of a sale or exchange of property, the extent to which the gain or loss determined under this section shall be recognized for purposes of this subtitle shall be determined under section 1002.

(d) *Installment sales.*

Nothing in this section shall be construed to prevent (in the case of property sold under contract providing for payment in installments) the taxation of that portion of any installment payment representing gain or profit in the year in which such payment is received.

§1002 *Recognition of gain or loss.*

Except as otherwise provided in this subtitle, on the sale or exchange of property the entire amount of the gain or loss, determined under section 1001, shall be recognized.

Appendix C—Constitutional Provisions, Statutes and Rules Involved

§1201 *Alternative tax.*

(b) *Other taxpayers.*

If for any taxable year the net long-term capital gain of any taxpayer (other than a corporation) exceeds the net short-term capital loss, then, in lieu of the tax imposed by sections 1 and 511, there is hereby imposed a tax (if such tax is less than the tax imposed by such sections) which shall consist of the sum of—

(1) a partial tax computed on the taxable income reduced by an amount equal to 50 percent of such excess, at the rate and in the manner as if this subsection had not been enacted, and

(2) an amount equal to 25 percent of the excess of the net long-term capital gain over the net short-term capital loss.

§1202 *Deduction for capital gains.*

In the case of a taxpayer other than a corporation, if for any taxable year the net long-term capital gain exceeds the net short-term capital loss, 50 percent of the amount of such excess shall be a deduction from gross income . . .

§1222 *Other terms relating to capital gains and losses.*

(3) *Long-term capital gain.*

The term "long term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income.

Appendix C—Constitutional Provisions, Statutes and Rules Involved

§7201 *Attempt to evade or defeat tax.*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

§7203 *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure.

Rule 8. *Joinder of Offenses and of Defendants.*

(b) Joinder of Defendants.

Two or more defendants may be charged in the same indictment or information if they are alleged to have par-

ticipated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. *Relief From Prejudicial Joinder.*

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 33. *New Trial.*

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 41. ***Search and Seizure.***

(e) Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

APPENDIX D

Decision of Court of Appeals on Motion for Rehearing and Stay of Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v.—

SALVATORE GRANELLO, a/k/a SALLY BURNS, and HYMAN LEVINE, a/k/a GEORGE LEVINE,

Appellants.

Petition for rehearing by Salvatore Granello and Hyman Levine and motion in the alternative for a stay of mandate and continuance of bail for Salvatore Granello pending certiorari.

IRVING ANOLIK, IRWIN KLEIN and IRWIN GERMAISE, New York, N. Y., for appellants.

Petition for rehearing by panel denied. Motion for stay of mandate with respect to Granello granted as provided in Rule 28(c) of this Court.

L. P. M.

H. J. F.

P. R. H.

U.S.C. JJ.

APPENDIX E

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of August one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Salvatore Granello, a/k/a Sally Burns,
and Hyman Levine a/k/a George Levine,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix E—Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

By Vincent A. Carlin
Chief Deputy Clerk